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# Second Generation of Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond

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# Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond

William H. Allen\* and Erin A. O'Hara\*\*

*In his 1963 article in the Stanford Law Review, "Choice of Law and the Federal System," Professor William F. Baxter criticized the choice-of-law approach of the First Restatement of the Conflict of Laws. According to the Restatement, courts should apply the law of the state where the last act or event deemed necessary to create a cause of action occurred. In contrast, Baxter advocated a comparative-impairment approach, whereby judges were obligated to apply the law of the state whose public policy would suffer the greatest impairment if its law was not applied. The authors contend that although Baxter's approach carries intuitive appeal for one interested in economic theory, available empirical evidence and public choice insights together indicate that Baxter's approach cannot work efficiently in practice. Because judges in practice have neither the data nor the intuitive understanding of the complexities of any legal problem to make the comparative-impairment determination in the scrupulous way that Baxter suggested, William H. Allen and Professor Erin A. O'Hara recommend a modified Restatement approach. They believe an approach that keeps the basic concepts of the Restatement but modifies rules that have not worked well in practice will generate greater predictability and less bias in decisionmaking.*

*A choice-of-law rule is an empty and bloodless thing.<sup>1</sup>*

Asked to name the great conflict of laws scholars of our century, one might think of Beale, Goodrich, Lorenzen, Yntema, Ehrenzweig, Walter Wheeler Cook, Willis Reese, David Cavers, Robert Leflar, Brainerd Currie and several from among a dozen or so who have been active in the last thirty or forty years. Narrowing this list to the few truly influential choice-of-law scholars would surely leave Joseph Henry Beale and his antagonist, Brainerd

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1. BRAINERD CURRIE, *On Displacement of the Law of the Forum*, reprinted in SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 52 (1963) [hereinafter SELECTED ESSAYS].

Currie. Leflar and perhaps one or two of the others would almost surely also remain, and very likely an outsider, William F. Baxter, would join them on that select list. Unlike the others named, Bill Baxter was not what Professor Lea Brilmayer, referring to conflicts scholars, would have called a "card-carrying member of this wild-eyed community of intellectual zealots."<sup>2</sup> Baxter's academic career was not devoted wholly or even in major part to conflicts; he wrote no treatise or series of articles elaborating his views on choice of law.

Baxter published but one article on the subject. It was his first signed scholarly work,<sup>3</sup> written when he was an associate professor at Stanford Law School—his academic home throughout his career—and published in the *Stanford Law Review* in 1963.<sup>4</sup> Thirty-five years later, the Baxter article is refreshingly different from much modern legal scholarship. It is written in English, sparsely but clearly and with style, and is accessible to anyone capable of following reasoned argument. More importantly, that single article has been cited scores of times,<sup>5</sup> is described in probably every American conflict of laws textbook,<sup>6</sup> and has been incorporated into the choice-of-law approach of at least one state, California.<sup>7</sup> If anything, modern choice-of-law scholarship continues to gravitate toward Baxter's ideas,<sup>8</sup> something that cannot be said of Beale or, perhaps, even of Currie.

The article was the product of an extraordinarily incisive, fertile legal mind brought to bear on a subject that Baxter was made to think about by the demands of a teaching assignment. At least in those distant days, young members of the Stanford Law School faculty taught whatever needed to be

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2. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS*, at xiii (1991).

3. The qualifier, "signed," is used deliberately. When Baxter was a student at the Stanford Law School, student work in the *Stanford Law Review* was not signed. He was, however, the author of Comment, *Interlocutory Orders "Refusing" Injunctions*, 7 *STAN. L. REV.* 549 (1955). Furthermore, every student comment in volume 8 of the *Review* bears a heavy imprint of Baxter's editing. One of us can attest to these propositions from first-hand observation.

4. William F. Baxter, *Choice of Law and the Federal System*, 16 *STAN. L. REV.* 1 (1963).

5. A Westlaw database search conducted in the fall of 1998 revealed 138 different law review articles in which Baxter's article has been cited just since 1981.

6. See, e.g., ROGER C. CRAMTON, DAVID P. CURRIE, HERMA HILL KAY & LARRY KRAMER, *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* 194 (5th ed. 1993); MAURICE ROSENBERG, PETER HAY & RUSSELL J. WEINTRAUB, *CONFLICT OF LAWS: CASES AND MATERIALS* 690 (10th ed. 1996); GARY J. SIMSON, *ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS* 178 (3d ed. 1997).

7. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978); *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976); see also *Johnson v. Johnson*, 216 A.2d 781, 783 (N.H. 1966) (comparing relative impairment of purposes behind states' laws).

8. In the last decade, several conflicts scholars have focused on states' bargaining, real or hypothetical, to generate rules that can, in the aggregate, further each state's policy interests. See, e.g., BRILMAYER, *supra* note 2, at 145-89; Larry Kramer, *Rethinking Choice of Law*, 90 *COLUM. L. REV.* 277, 315-44 (1990); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 *VAND. J. TRANSNAT'L L.* 975, 1017-22 (1994).

taught. Thus, in the early years of his academic career, Bill Baxter taught conflicts along with administrative law, admiralty, agency, federal jurisdiction, persons (as Stanford called the domestic relations course), practice, and the business of the Supreme Court. The article grew out of his teaching, as indicated by its first sentence: "After attempting for several years to teach the rules devised for the resolution of choice-of-law problems, I have concluded that those rules do not yield satisfactory results."<sup>9</sup>

The rules in 1963 were everywhere, or almost everywhere, the rules that Joseph Beale, as reporter for the *Restatement of Conflict of Laws (First Restatement)* and author of a contemporaneous three-volume treatise,<sup>10</sup> had undertaken to state and to underpin intellectually.<sup>11</sup> The rules related to where events occurred or things were. If an automobile accident happened or a contract was concluded or a piece of real property was located in a particular state, only the law of that state was pertinent to any ensuing tort or contract or quiet-title action.

As Baxter acknowledged, he was not the first critic of these rules.<sup>12</sup> Criticism began almost as soon as the *First Restatement* was adopted and the treatise published. When Baxter's article appeared in December 1963, the most prolific of the critics, Brainerd Currie, had just published an extraordinary collection of law review articles that he had written in the preceding few years.<sup>13</sup> In them Currie did not merely criticize. He offered a coherent global alternative to the "conceptualistic" (a term of opprobrium for those schooled in legal realism) rules of the *First Restatement*.<sup>14</sup> His alternative not only appealed to his fellow scholars but also found favor with judges, the essential audience for one who would reform common law doctrine.

Currie offered "interest analysis" as the basis for choice of law, and Baxter began his article by following Currie's lead. He agreed with Currie that analysis should begin by discerning which state or states, if any, had genuine policy interests at stake in the resolution of a multistate dispute. One of Currie's central insights was that many cases thought to pose an issue that could superficially be characterized as a conflict of laws in fact involved no conflict. These were in fact false conflicts because only one of the jurisdictions arguably interested in the dispute had a genuine interest in the appli-

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9. Baxter, *supra* note 4, at 1.

10. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]; JOSEPH H. BEALE, THE CONFLICT OF LAWS (1935).

11. See LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS, at xxviii (4th ed. 1995) (noting that Beale's theory "appeared for a time to be headed for apotheosis by the United States Supreme Court as a branch of the law of due process").

12. See Baxter, *supra* note 4, at 1.

13. In a footnote, Baxter listed thirteen articles and one book review that Currie wrote or co-wrote in the period 1958-1963 (most in 1958 and 1959). See Baxter, *supra* note 4, at 6 n.13. These and others were collected in SELECTED ESSAYS, *supra* note 1.

14. See Baxter, *supra* note 4, at 10.

cation of its law. Currie recognized that his central insight did not account for all the cases. Some cases posed a real conflict, where two or more states with arguable interests in a matter had genuine interests. For these cases, Currie proposed application of the law of the forum. Baxter parted company with Currie at this point. To Baxter, the application of forum law in a true-conflict case was just as arbitrary as any of the *First Restatement* rules, and it would invite forum shopping and produce other evils.<sup>15</sup>

In an effort to resolve the case of the true conflict more satisfactorily, Baxter asked an important, but until then overlooked, choice-of-law question: How can fifty states choose what law to apply in multistate cases so as to maximize their varying substantive policies? Though it might not have been so characterized at the time,<sup>16</sup> this is quintessentially a law and economics question. Stated more generally, the question is what social policy will maximize utility across the individuals or entities affected by the problem at which the policy is aimed.<sup>17</sup> Baxter concluded that true conflicts should be resolved by applying the law of the state whose policies would be most impaired by application of the other state's law. By engaging in this "comparative-impairment" analysis, courts could maximize the joint effectuation of states' policies.

Many early law and economics scholars attempted to answer this type of question without adequately considering the costs, political and otherwise, associated with public policy decisionmaking. But Baxter was keenly aware of the difficulty, if not futility, of asking fifty self-interested states' courts to coordinate their choice-of-law policies to their joint benefit. The last half of his forty-two-page article is devoted to an elegant argument that the federal courts should interpret the Full Faith and Credit Clause and use their diversity jurisdiction to foster comparative-impairment analysis as the basis for choice of law.<sup>18</sup> It is fair to say that this part of the article, though of con-

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15. See *id.* at 9-10.

16. The *Journal of Law and Economics* had begun publication only five years earlier, in 1958. The first edition of Posner's *Economic Analysis of Law* would not appear until 1972. Baxter himself first taught by name a course that heavily implicated economics—"Regulated Industries"—in 1963-1964 (although he told one of the authors that his administrative law course, which he began teaching in his first year on the faculty, had become increasingly concerned with the economically inefficient policies of the economic regulatory agencies of that time, so that "Regulated Industries" was more a change of name than a new course). He first taught the antitrust course, styled "Government Regulation of Business," in 1966.

17. Describing hypothetical bargaining between states about which state's law would apply, Baxter wrote that "the final agreement would approximate maximum utility to each." Baxter, *supra* note 4, at 7.

18. Baxter taught federal jurisdiction and had had a particular interest in the subject since his student days. A faculty member told Baxter of the then-novel Hart and Wechsler casebook. Baxter soon asked for, and received, a copy as a birthday present. He read the book in the summer between his second and third years in law school. In his third year, he organized a series of seminars on sections of *The Federal Courts and the Federal System*, inviting a few students and faculty members to participate.

tinuing intellectual interest,<sup>19</sup> has had no influence. The Full Faith and Credit Clause has become no more demanding in choice-of-law cases. *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>20</sup> has not been overruled (as Baxter urged). Thus, a federal district court in a diversity case that poses a choice-of-law issue still must decide the case just as the state court in the courthouse across the street would. With the advantage of hindsight, Baxter's proposal seems utterly unrealistic and, even in 1963, must have seemed more hopeful than practical.

It is our thesis that the knowledge that federal judges would not step into the breach and a more refined understanding of the public choice and other economics problems involved in fashioning a rational choice-of-law system for a federal republic of fifty sovereign states might have led a later Baxter toward, if not quite to, the very *First Restatement* choice-of-law rules that had frustrated him in his teaching. We support this thesis by using insights into choice of law that Baxter elucidated.

In Part I, we examine in some greater detail the rules of the *First Restatement* and the reasons that Baxter and others found them so unsatisfactory. In Part II, we elaborate our description of Currie's interest analysis and Baxter's refinement of it. In Part III, we discuss some of the flaws of interest analysis that have appeared in its application. In Part IV, we conclude that Baxter's refinement would not effectively cure these flaws, and finally in Part V, we offer some alternative ideas for a choice-of-law system that we hope would have had some appeal to Bill Baxter, that most incisive and objective of critics.

## I. THE *FIRST RESTATEMENT* AND ITS CRITICS

The *First Restatement* embodied the traditional approach to choice of law, which at one point was followed in all fifty states.<sup>21</sup> The *First Restatement* contained a set of rules derived from two interrelated formalistic concepts. The first was the "territoriality" of states' powers: Each state controlled the people and events within its borders, but no state controlled people or events outside of its borders.<sup>22</sup> Of course, some disputes involve people and events that span state lines; consequently, exclusive territoriality required a more refined allocation of state powers. This refinement came from the second concept embodied in the traditional approach, "vested rights."

According to the vested rights "theory," articulated by Joseph Beale, individual rights vest, if at all, at only one place and one point in time. Rights

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19. See BRILMAYER, *supra* note 11, at 716-17; ROSENBERG ET AL., *supra* note 6, at 692-93.

20. 313 U.S. 487 (1941).

21. See BRILMAYER, *supra* note 11, at 1 (acknowledging that the territorial approach "once represented the universal American approach to choice of law").

22. See 1 BEALE, *supra* note 10, §§ 2.1, 5.2.

typically vested with the occurrence of one particular act or event, and the substantive law of the state in which the vesting act occurred governed any dispute engendered by an alleged violation of that right. Only the vesting state's substantive laws provided a remedy. Any other state that entertained a lawsuit must therefore apply the vesting state's substantive law to the dispute.<sup>23</sup>

In general, a right vested in the state where the last act or event deemed necessary to create the cause of action occurred. In tort cases, it was the law of the place of injury that applied.<sup>24</sup> For contracts, the law of the state where a contract was concluded governed the validity of the contract and the substantial obligations of the parties,<sup>25</sup> while the law of the place of performance governed minor details of performance.<sup>26</sup> In the case of real property, states applied the law of the situs of the property.<sup>27</sup> Specific *First Restatement* rules determined the choice of law for a wide variety of legal issues, including corporate shareholders' liabilities,<sup>28</sup> administration of decedents' estates,<sup>29</sup> entitlement to workmen's compensation,<sup>30</sup> and determination of marital status.<sup>31</sup> The rules, taken together, promised certainty and therefore predictability in the resolution of choice-of-law issues.<sup>32</sup>

During the three decades that followed its publication, however, the *First Restatement* was subjected to severe scholarly criticism.<sup>33</sup> Beginning about the time Baxter wrote of his own and others'<sup>34</sup> dissatisfaction with the *First Restatement* rules, individual states increasingly rejected them as well.<sup>35</sup> Concerns about the *First Restatement's* rules fell principally into two categories. The first was a widespread criticism that, despite Beale's attempt to

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23. See BRILMAYER, *supra* note 2, at 19-20.

24. See FIRST RESTATEMENT, *supra* note 10, § 377.

25. See *id.* § 332.

26. See *id.* § 358.

27. See *id.* §§ 216-251.

28. See *id.* §§ 185-191.

29. See *id.* §§ 465-524.

30. See *id.* §§ 398-403.

31. See *id.* §§ 121-136.

32. Cf. HERBERT F. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 92, at 261-62 (3d ed. 1949) (application of a law other than that dictated by the *First Restatement* "would impose a criterion that would not have been foreseen by at least one of the two parties to the suit").

33. See generally WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); SELECTED ESSAYS, *supra* note 1; Fowler V. Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L.J. 1155 (1947); Roger J. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230.

34. See Baxter, *supra* note 4, at 1 n.1 (noting that "[m]any more experienced writers apparently agree with [my] evaluation," citing Walter Wheeler Cook, David Cavers, Brainerd Currie, and Justice Roger Traynor).

35. For a description of criticisms of the *First Restatement* that eventually led to the rejection of the *First Restatement* rules by the states, see BRILMAYER, *supra* note 11, at 201-03.

supply it, the rules lacked any coherent normative underpinning.<sup>36</sup> Even if one assumed that the rules led to certain and predictable choices of law, that virtue was thought not to be sufficient justification for a legal rule. As Baxter pointed out, any choice rule, "uniformly adopted and applied," would serve the desirable objective of predictability.<sup>37</sup> Indeed, that is true not just of choice of law, but of any legal rules. The question that remains is what the content of any legal rule should be. The vested rights approach focused on the "last act necessary" to give rise to a cause of action, but there appeared to be nothing inherently right about choosing the last act for choice-of-law purposes, as opposed to any other significant fact relevant to the incident, transaction or status of the parties.<sup>38</sup> To conflicts scholars, the rules seemed largely arbitrary, indeed counterintuitive.<sup>39</sup>

Second, for a variety of reasons, the *First Restatement* rules did not seem even to yield the certainty and predictability advocated as their virtue. Baxter asserted that, "[a]s means to the end of predictability," these rules "are vulnerable to attack, not because they are too rigid, but because they are not rigid enough."<sup>40</sup> For example, a court was required to look at the place of execution of a contract to determine the validity of that contract, but determining the "place of execution" is subject to the uncertain applications of the law of offer and acceptance. "When, and therefore where, binding agreement occurred is often debatable."<sup>41</sup>

Beyond that, there is the problem of characterization. For example, all choice-of-law systems agree that issues of procedure are governed by the law of the forum; only issues of substantive law are subject to choice-of-law

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36. "Only the lawyer, specially disadvantaged by his professional training, could assert as an original proposition that a contract case *ought* to be decided according to the law of the place where the contract was made or that a tort case *ought* to be decided by the law of the place of injury." Baxter, *supra* note 4, at 2.

37. See Baxter, *supra* note 4, at 3.

38. See Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1197 (1987) (describing Walter Wheeler Cook's critique of traditional choice-of-law rules).

39. See CURRIE, *supra* note 1, at 6 ("Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another."); *id.* at 12 (noting that Professor Nussbaum's proposed solution "'furnishes another point against the vested right doctrine'" (citation omitted); CURRIE, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, reprinted in SELECTED ESSAYS, *supra* note 1, at 128, 158 (arguing that "while it sometimes makes sense to apply the law of the place of the wrong with respect to some questions, it makes no sense whatever to apply the law of the place of the wrong concerning survival in [certain] fact situation[s]") (citation omitted); CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, reprinted in SELECTED ESSAYS, *supra* note 1, at 77, 116 (characterizing his proposed solutions as "not choice-of-law rules in the traditional sense. . . . They do not say directly what law shall govern. They simply say that a particular law is intended to govern in certain cases. It seems to me that there are advantages in this way of stating conflict-of-laws rules") (citation omitted).

40. Baxter, *supra* note 4, at 3.

41. *Id.* at 4; see also *id.* at 4 n.8 (citing examples).



rules.<sup>42</sup> The initial characterization of an issue as procedural or substantive can thus be determinative. But, of course, one of the earliest truisms that a law student learns is that the line between the procedural and the substantive wavers. Moreover, even within the realm of the undoubtedly substantive, characterization of a dispute often precedes analysis. In a dispute over real property that was the subject of a contract, a court could treat the case either as a property case, and thus apply the law of the situs of the property, or as a contract case and look to the place where the contract was made.<sup>43</sup> And so of cases at the margin between tort and contract,<sup>44</sup> and cases that might be said either to involve substantial contractual duties or to concern mere details of contractual performance.<sup>45</sup> If the invitations to judicial manipulation inherent in the uncertainty and ambiguity of application of the rules were not enough, a court could sometimes straightforwardly justify an unwillingness to apply any law other than its own on the ground that sister-state law offended the public policy of the forum.<sup>46</sup>

Critics suggested that courts manipulated or escaped from the supposed rigors of the *First Restatement* rules as often as they did for the very reason that the normative criteria of those rules had no intellectual grounding.<sup>47</sup> Since judges were already covertly basing their actual choice-of-law decisions on criteria not reflected in the *First Restatement* rules, why not permit—or require—the judges to do so explicitly?<sup>48</sup> A number of substitute normative choice-of-law criteria have been proposed and some have been

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42. See EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 3.8, at 58-59 & n.2 (2d ed. 1992) (citing Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 344 (1933) and Aaron D. Twerski & Renee G. Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 NW. U. L. REV. 781, 784 (1979)).

43. See BRILMAYER, *supra* note 11, at 124-25 (noting the general problem of characterization and the unsatisfactory resolution of this problem by the *First Restatement*).

44. SCOLES & HAY, *supra* note 42, § 3.4 (discussing the difficulty of characterizing a case as either tort or contract, citing several cases).

45. Cf. FIRST RESTATEMENT, *supra* note 10, § 358 cmt. b (noting that "no logical line" separates the two types of contract issues).

46. See *Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986) (refusing to enforce automobile guest passenger statutes of other states, because they violated West Virginia public policy); *Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 498 A.2d 605 (Md. 1985) (refusing to enforce a contractual clause providing for the indemnity against the results of one's sole negligence, because it violated Maryland public policy); see also Comment, *Public Policy and the Conflict of Laws*, 7 STAN. L. REV. 275, 278 (1955).

47. See, e.g., BRILMAYER, *supra* note 2, § 1.4 (noting that the system treated the nature of laws as though they were "fixed concepts of eternal truth"); CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, reprinted in SELECTED ESSAYS, *supra* note 1, at 177, 180-81 (enumerating some irrational elements of the conflict of laws doctrine).

48. "The court is not idly choosing a law; it is determining a controversy." GENE R. SHREVE, A CONFLICT-OF-LAWS ANTHOLOGY 55 (1997) (citing David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 189 (1933)).

adopted by one or more states.<sup>49</sup> We concentrate here on Currie's interest analysis and Baxter's refinement of it because Baxter's scholarly work is the focus of this symposium and because Currie's interest analysis is widely used in American courts, even courts that profess to follow the amorphous directions of the *Second Restatement of Conflict of Laws* (*Second Restatement*). Under the *Second Restatement*, a court decides which state has the most significant contact with an incident or dispute and applies its law.<sup>50</sup> This approach is the favorite of scholars and judges who delight in the large measure of judicial discretion that results when judges are asked to catalog and weigh a number of usually incommensurable factors. We deal with it and other regimes only glancingly in this article.

## II. INTEREST ANALYSIS AND BAXTER'S REFINEMENT

Brainerd Currie, the father of interest analysis, thought that the choice of governing law should not turn on the perhaps fortuitous location of the last act necessary to create a cause of action.<sup>51</sup> Rather, choice of law should begin with the recognition that the laws of the competing states reflect the policies of those states. And the law that is chosen should effectuate those policies.<sup>52</sup> Of course, a state must have a legitimate claim to the application of its law; New Mexico might take great pride in its tort policies, but if an accident has no connection with New Mexico, then its policies are irrelevant to a suit arising from that accident. Territoriality demands this much.

Once a connection with more than one state is established, Currie's next step is to determine whether each state involved has an "interest" in the application of its law to the dispute. No real conflict-of-laws problem arises unless two or more states whose laws differ have policy interests in the dispute,<sup>53</sup> and Currie defined state interests quite narrowly. Specifically, because legislators pass laws to aid their constituents, Currie thought judges should assume that a state's laws are intended to protect only state residents, not outsiders.<sup>54</sup> For example, if a Massachusetts plaintiff sued a Virginia

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49. State counts for the approaches vary by the commentator. According to Patrick Borchers, for torts, fifteen states have retained the *First Restatement*, twenty-four states have adopted the *Second Restatement*, four states, including California, use interest analysis, and five states use Leflar's approach, leaving three states unclassified. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 373-74 (1992). See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233 (1998) (describing states' methodological camps for tort and contracts).

50. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

51. See CURRIE, *supra* note 47, at 180-83.

52. See *id.* at 183-86.

53. See *id.* at 183-84.

54. See *id.* at 185-87. See generally John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 WM. & MARY L. REV. 173 (1981) (debating the notion that states have a greater interest in advancing the interests of their own citizens than those of outsiders).

resident for breach of contract, Virginia would not have an interest in applying its laws to enforce the contract. To be sure, Virginia contract law reflects a policy that people should be able to rely on their contracts. However, its laws are intended to protect the reliance interests of Virginians only. And, surely, Virginia has no interest in enforcing a contract against one of its own citizens to the benefit of an outsider, especially if the plaintiff's home state of Massachusetts would not enforce a similar contract.

Currie concluded that if only one state is interested in a dispute, in this rather narrow sense, then that state's law should apply. If no state has an interest, then forum law should be applied to fill the void.<sup>55</sup> In this "unprovided[-for] case,"<sup>56</sup> the controversy must be resolved with reference to some law, and presumably the familiar forum law is both more easily and more readily applied.<sup>57</sup> But, if more than one state is genuinely interested in the dispute, then the court should not attempt to weigh or balance the competing policies. Doing so would require the court to make a "super-value judgment" for which it is ill-equipped. Courts typically lack both the information necessary to decide which policy is preferable and the techniques to gather the necessary information. Furthermore, in making such a judgment, they would be performing essentially a political function more appropriately left to the legislative branch.<sup>58</sup> Instead, a court should resolve the conflict by giving effect to those policies that judges are placed on the bench to protect—local ones. Thus, forum law should apply when no state has a genuine interest in the outcome of a dispute *and* when two or more states have such interests; otherwise, the law of the only state with an interest applies.

Baxter agreed with Currie that choice of law should be used to effectuate states' policies, and he favored generally Currie's interest analysis approach.<sup>59</sup> Baxter took issue explicitly only with Currie's treatment of "true conflicts," those cases where more than one state has an interest in the outcome.<sup>60</sup> Baxter's discussion of states' interests, however, indicated that he also differed from the master in taking a broader view of what those interests are, a point to which we shall revert.

To Baxter, the choice of forum law in the case of true conflicts was every bit as arbitrary as the *First Restatement* rules.<sup>61</sup> If both South Carolina and Virginia had an interest in a dispute, a Virginia court would apply Virginia law, but a South Carolina court would apply South Carolina law. And thereby the parties were deprived altogether of what he termed "primary pre-

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55. See CURRIE, *supra* note 47, at 184.

56. CURRIE, *Survival of Actions*, *supra* note 39, at 152.

57. See note 55 *supra* and accompanying text.

58. See CURRIE, *supra* note 47, at 181-83.

59. See Baxter, *supra* note 4, at 8.

60. See *id.* at 8-9.

61. See *id.* at 9.

dictability," the ability "to predict what the legal consequences of . . . [particular] conduct, if litigated, would be held to be."<sup>62</sup> Currie's proposal would foster what Baxter called "secondary predictability," the ability of the parties to predict the legal consequences a particular court would attach to past conduct once a matter was in litigation.<sup>63</sup> But that very predictability would encourage forum shopping and races to judgment, and both are wasteful activities. Currie's proposal therefore "compares unfavorably with any rule of decision, however arbitrary, that facilitates primary predictability."<sup>64</sup>

Baxter offered a normative criterion to resolve true conflicts: Courts should maximize the joint effectuation of state policies.<sup>65</sup> In effect, Baxter treated true conflicts as optimization problems, which he then resolved by placing the states in a hypothetical negotiation. Suppose, for example, that representatives from the states of Virginia and South Carolina sat down to allocate their respective policymaking spheres of authority. Currie was clearly correct that each state would gladly cede to the other those cases in which it lacked any interest. But Baxter went further by pointing out that the states would also bargain over those cases whose outcome both wanted power to control. Both states could be made better off if these cases could be allocated optimally, and, presumably, each would agree to cede control over those categories of cases in which it had less interest in return for gaining control over cases in which it had a greater interest.<sup>66</sup> Of course, there would in fact be no such bargaining among state lawmakers so that it was left to state law expounders, the judges, to effectuate the hypothetical bargain by determining, as choice-of-law cases arose, the extent to which each state's policy would suffer if the court applied the differing law of the other state. Comparing the resulting impairment of states' policies, then, a court should apply the law of the state whose policy would suffer the greatest impairment if its law was not applied. Hence the label "comparative impairment."<sup>67</sup>

In game theory terms, Currie had assumed that true conflicts cases were zero-sum games,<sup>68</sup> and therefore the resolution of a true conflict constituted a noncooperative game.<sup>69</sup> In effect, Baxter argued that these cases instead had

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62. *Id.* at 3.

63. *See id.*

64. *Id.* at 9.

65. *See id.* at 8-22.

66. *See id.* at 11-17.

67. *See id.* at 18.

68. Zero-sum games are those in which any gains to one player, here a state, come at the identical expense of the other. *See* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 43, 317 (1994).

69. Noncooperative games are those in which the players cannot coordinate their decisions. *See* MARTIN SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES: CONCEPTS AND SOLUTIONS* 217 (1982). In zero-sum games, there are no gains from coordination, and thus players have no incentive to cooperate.

a positive sum,<sup>70</sup> so that resolving them entailed a potentially cooperative equilibrium.<sup>71</sup>

### III. THE DIFFICULTIES OF INTEREST ANALYSIS

Over time, interest analysis acquired its own critics. The most significant criticism, for our purposes, is that it abandons "multilateral" choice-of-law decisionmaking. The *First Restatement* is methodologically a "multilateral" scheme because its rules are neutrally applied by a state, and no special advantage is supposed to be given to the law of the forum. Under interest analysis, by contrast, choice-of-law decisions are made unilaterally.<sup>72</sup> The court first inquires whether its state has an interest in applying its law. If it does, that is the end of the matter: The law of the state, forum law, is applied. The debate is ended, and forum law is also applied if no arguably interested state has a real interest in applying its law. Only if the forum state lacks an interest in applying its law while a sister state has such an interest is sister-state law applied.

It was predictable that under such a regime forum law would be applied more frequently than under some others, as recent empirical work confirms. Although the empiricists disagree about the relative effect of other modern choice-of-law approaches, all the studies indicate that interest-analysis courts are more likely to apply forum law in multistate disputes than are courts that follow the *First Restatement* rules.<sup>73</sup> The increased likelihood that forum law will be applied highlights a classic difficulty with turning positive realist reasoning into normative prescriptions. The critics of the *First Restatement*

70. Cf. Kramer, *supra* note 8, at 340 (noting that some resolution of choice-of-law issues can leave both states better off). Baxter did not explicitly use game-theory analysis or even refer to its vocabulary. He had been introduced to game theory, however, if only by an article that he had surely read since it appeared in the volume of this *Review* of which he was a senior editor. Martin Shubik, *A Game Theorist Looks at the Antitrust Laws and the Automobile Industry*, 8 STAN. L. REV. 594 (1956).

71. See BRILMAYER, *supra* note 2, at 155. As Brilmayer further explained,

What makes the game theory literature so helpful is that it illustrates the possibility of developing rational strategies that achieve better results through cooperation than through short-run pursuit of selfish gains. Even in a situation where there is no authoritative enforcer of choice of law rules, states may in some circumstances be able to do significantly better in achieving their own goals if they act with awareness of the goals they share with others. In older choice of law cases, this point was intuitively described in terms of comity and reciprocity.

*Id.* at 157-58 (citations omitted).

72. For a general discussion of the distinction between unilateral and multilateral choice-of-law decisionmaking, see William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 106-21 (1998).

73. See Borchers, *supra* note 49, at 366; Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 50 (1989) (noting that critics have found modern approaches to be "pro-resident, pro-forum law, pro-recovery"); Stuart Thiel, *Choice of Law and the Home Court Advantage: Evidence*, at text accompanying nn.57-60 (1996) (unpublished manuscript on file with the *Stanford Law Review*).

pointed to a number of decisions in which courts manipulated the *First Restatement* rules or used an escape device such as the public policy exception in order to apply forum law. The critics therefore concluded that the rules did not impose any real constraint on judges.<sup>74</sup> If, the critics went on, courts were not effectively constrained by the supposedly multilateral choice-of-law approach, then courts should at least be open about their unilateral decision-making.<sup>75</sup> Interest analysis theoretically enables judges to be more honest and, at the same time, to effectuate state interests. However, once courts moved away from the *First Restatement* rules, they applied forum law even more often.

The preceding paragraph implies a belief that a bias in favor of forum law is undesirable. Economic arguments in favor of such a bias, based on the benefit of creating useful home-state law precedent (as against relatively useless interpretations of foreign law) and the greater cost of ascertaining foreign law, can clearly be made. We believe, however, that, to the extent that any such advantages of forum-law bias exist, they are offset by the encouragement that it gives to forum shopping and races to judgment. Quite simply, if courts are likely to apply forum law, then the benefits of forum shopping rise.<sup>76</sup>

The possibilities of finding a favorable forum are probably even greater than they were thirty-five years ago, when Baxter noted that "members of our society, in both their personal and business activities, increasingly disregard the existence of state boundaries,"<sup>77</sup> and that people and companies can be sued in more and more places.<sup>78</sup> In those circumstances, the application of the law of whatever state happens to be the forum seriously impairs primary predictability.<sup>79</sup> We again quote his explanation of the term: "[T]he

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74. See, e.g., CURRIE, *supra* note 47, at 181 (noting that choice-of-law rules are "loaded with escape devices"); David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 198 (1933) (pointing out the difficulty of formulating effective rules).

75. See, e.g., CURRIE, *supra* note 47, at 181 ("[W]e are handicapped in even presenting the issue in its true light . . .").

76. We have quoted Baxter's criticism on this score above and cannot improve upon it. See text accompanying notes 15 & 64 *supra*.

77. Baxter, *supra* note 4, at 1.

78. See *id.*

79. One might quarrel with the textual argument by urging that, since we can expect future plaintiffs to sue in that forum that has the most plaintiff-favorable local laws, Currie's interest analysis provides plenty of primary predictability. We find this argument lacking for at least two reasons. First, plaintiffs choose their fora for many reasons in addition to seeking favorable laws. Some attorneys prefer the ease of litigating in local courts, and others prefer favorable jury pools. Moreover, the parties may create unexpected contacts with new states *ex post*, opening up forum possibilities that were not contemplated at the time of the parties' transaction or litigation-creating acts. Second, people often cannot predict which party will be the named plaintiff in a future dispute. In contracts, for example, the "victim" of a breach can sue for breach of contract, but the breacher might sue first, bringing a declaratory judgment action. Compare *ShIPLEY CO. v. KOZLOWSKI*, 926 F. Supp. 28 (D. Mass. 1996) (employer sued former employee for breach of noncompeti-

ability of persons (or their attorneys), at the time they are conducting their business or driving their automobiles or drawing their wills or engaging in analogous activities other than litigation, to predict what the consequences of that conduct, if litigated, would be held to be."<sup>80</sup>

Public choice theory has revealed an additional problem, not generally discussed in the conflicts literature,<sup>81</sup> with the definition of interests: Interest analysis can increase both the likelihood and the durability of inefficient laws—laws that do not allocate benefits and burdens in the way that maximizes the welfare of citizens of a state. States, as we have said, were presumed by Currie to be interested only in protecting or compensating their own. Legislators serve their constituents, not outsiders. Thus, it seemed only natural, although admittedly cynical, to assume that any state's law was intended to aid insiders only.

Public choice theory tells us that some interest groups organize more cheaply and effectively than others to extract legislative favors, and that, as a consequence, statutes do not necessarily allocate burdens and benefits efficiently.<sup>82</sup> However, as Gary Becker has pointed out, there is a natural limit on the degree to which winning groups can impose costs on the rest of society in order to reap those legislative gains. Eventually a regulatory or other legislative program created as a result of political pressure can become so costly that taxpayers are willing to incur the relatively large costs of organizing to alleviate the costly tax and/or regulatory burdens imposed by the more readily organized group's activities.<sup>83</sup> Awareness of the possibility of organized protest can be enough to minimize the costs of both seeking and implementing inefficient laws.<sup>84</sup>

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tion agreement), with *Enron Capital & Trade Resources Corp. v. Pokalsky*, 490 S.E.2d 136 (Ga. Ct. App. 1997) (employee and new employer sue former employer to void noncompetition agreement).

80. Baxter, *supra* note 4, at 3.

81. For another very brief discussion of this public choice insight, see Erin O'Hara & Larry E. Ribstein, *Interest Groups, Contracts and Interest Analysis*, 48 MERCER L. REV. 765, 766-68 (1997) (noting that the real intent of legislatures cannot necessarily be deduced by hypothesizing a public purpose).

82. See generally ROBERT E. MCCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* (1981) (examining the brokering function provided by politicians in supplying legislation to groups); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (arguing that members of a large group tend not to act to advance common interests); GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975) (noting that some groups stand to gain more than others from boons the State can confer).

83. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 390-91 (1983) (describing the process of achieving general political equilibrium).

84. For a discussion of this possible effect, as well as the influence of the courts, in the criminal law context, see Richard S. Murphy & Erin A. O'Hara, *Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information*, 5 SUP. CT. ECON. REV. 217, 238-43, 274-78 (1997).

Interest analysis may skew the interest group balance toward inefficiency, however. Under interest analysis, a state's laws are more likely to be applied against outsiders than against the insiders who can more effectively oppose the legislation. And the outsiders against whom a law is applied lack a direct voice in the legislature, so that costs imposed on them may not be fully internalized within the state. One of us has elaborated on this point elsewhere, using the following example:

[S]uppose state C has few manufacturers and wants to impose more products liability than is optimal (i.e., more than consumers would be willing to buy). The legislature may pass the law in the absence of voting pressure from those aligned with manufacturers. Interest analysis helps promote this result by ensuring application of the law by state C courts to local consumers, but not necessarily against local manufacturers, most of whose customers may live outside the state. Even if the court is willing to apply local law to an out of state plaintiff, the latter may be deterred from taking advantage of the bias by the need to travel and hire local counsel. Thus, interest analysis facilitates inefficient laws by imposing the costs of those laws on people and firms who have no direct vote.<sup>85</sup>

The empirical studies comparing state choice-of-law approaches for torts all confirm the factual premise of our argument: The modern approaches, especially interest analysis, tend to lead to choice-of-law determinations favoring the local resident (and disfavoring the foreign party) more often than under the *First Restatement*.<sup>86</sup> New York's famous guest statute cases also provide evidence, albeit anecdotal, of the interest analysis bias in favor of local residents against foreign residents. In a series of cases, New York's highest court considered the applicability of a foreign guest statute, which either precludes or limits a passenger's ability to recover from a host driver for injuries sustained in a car accident caused by the driver's negligence, when New York had no such guest statute.

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85. O'Hara & Ribstein, *supra* note 81, at 767. For a similar argument, see Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, in *NEW DIRECTIONS IN LIABILITY LAW* 90 (Walter Olson ed., 1988) (noting that no state can ensure that its consumers, manufacturers, and workers will capture the benefits of its legislation). *But see* Bruce L. Hay, *Conflicts of Law and State Competition in the Product Liability System*, 80 *GEO. L.J.* 617, 632-36 (1992) (arguing that interest analysis leads to less expansive products liability than did the *First Restatement*).

86. *See* Borchers, *supra* note 49, at 377 (citing study of approximately 800 state and federal cases, which indicates that the decisions of states using modern approaches more frequently favor residents than those of *First Restatement* states); Solimine, *supra* note 73, at 87-89 (study of 227 state and federal tort cases indicates decisions rendered according to modern choice-of-law theories relatively more resident-favoring than *First Restatement* decisions); Thiel, *supra* note 73, at tbl.4 (using more sophisticated methodology to analyze Borchers' data and concluding that interest analysis states have stronger bias toward residents in their determinations than states using any other choice-of-law approach). *See generally* Erin A. O'Hara & Larry E. Ribstein, *Law and Economics of Conflicts of Law and Choice of Law*, in *Ghent International Encyclopedia of Law and Economics* (forthcoming 1999) (manuscript on file with the *Stanford Law Review*).



In the first case, *Babcock v. Jackson*,<sup>87</sup> both passenger and driver were New York residents, and the accident occurred in Ontario, which at the time precluded recovery by guest passengers against their host drivers. The court ignored the guest statute and applied New York's simple negligence rule, noting that New York had a strong interest in ensuring compensation to its injured residents.<sup>88</sup> In contrast, Ontario's statute was intended to prevent the fraudulent assertion of claims by passengers in collusion with their drivers against insurance companies.<sup>89</sup> Because the statute was intended to prevent fraudulent claims only against Ontario defendants and their insurance companies, Ontario had no significant interest in the outcome of the case.<sup>90</sup>

The second case, *Tooker v. Lopez*,<sup>91</sup> also involved New York residents. The passenger was killed in Michigan, where both passenger and driver were college students. The trip in question took place solely within the state of Michigan, which had a guest statute. Because both students resided in New York, however, the court reasoned that New York had the same interest in compensating the plaintiff that it did in *Babcock*.<sup>92</sup> Michigan had no corresponding interest in preventing fraudulent claims, because the car was registered and insured in New York.<sup>93</sup>

The court took an interesting turn, however, in *Neumeier v. Kuehner*.<sup>94</sup> In this third case, the driver, a New York resident, registered and insured his car in New York. His guest, an Ontario resident, was injured in Ontario. The New York court reasoned that here, unlike *Tooker*, New York had no interest in applying its law, because it did not care about guaranteeing compensation to Ontario residents.<sup>95</sup> According to the court's reasoning in *Babcock* and *Tooker*, Ontario had no interest in preventing fraudulent claims, because the driver, a New York resident, had insured his car in New York.<sup>96</sup> Based on the previous cases, then, *Neumeier* seemed to be an unprovided-for case in which New York law would therefore apply.

Not so, however. In *Neumeier* itself, New York's lack of interest in the case indicated to the court that New York was not justified in ignoring Ontario's laws. Moreover, the passenger was entitled to no more protection than his home state laws afforded him, given that his trip was confined within Ontario's borders. In the end, then, New York's law was applied to

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87. 191 N.E.2d 279 (N.Y. Ct. App. 1963).

88. *See id.* at 284.

89. *See id.*

90. *See id.*

91. 249 N.E.2d 394 (N.Y. Ct. App. 1969).

92. *See id.* at 399.

93. *See id.* at 398.

94. 286 N.E.2d 454 (N.Y. Ct. App. 1972).

95. *See id.* at 456.

96. *See id.* at 457-58.

help New York residents, but not to hurt them at the expense of outsiders. And the extent to which New Yorkers would bear the brunt of the law, through either direct liability or insurance premiums, would therefore be reduced.

Whatever else one might think of a court's bias in favor of its residents, that bias can affect that state's statutes. Because of resident bias, a state's residents fully capture the benefits of its laws, here compensation to New York plaintiffs, but may not be subject to the costs the law imposes, here defendant liabilities. While this does not necessarily render the resulting laws inefficient, the spillover effects of court bias on the efficiency of enacted statutes can be detrimental.

#### IV. COMPARATIVE IMPAIRMENT: AN IMPROVEMENT ON INTEREST ANALYSIS?

Baxter's signal contribution was devising a rational method of resolving those cases whose difficulty made Brainerd Currie figuratively throw up his hands: the cases of true conflicts between state laws. Baxter, as we have said, embraced Currie's idea of the false conflict; he began his hypothetical state bargaining session by having each of his states *X* and *Y* agree to concede to the other control of cases in which it had no genuine interest. Only after those easy concessions did he have them begin their more serious trading of this impairment of *X*'s policy objective for that impairment of *Y*'s.<sup>97</sup> Baxter ignored Currie's unprovided-for cases, those cases in which no state had a real interest, which Currie also assigned to forum law. That was perhaps because, while he did not expressly disagree with Currie's narrow definition of state interests, his hypothetical cases reveal a broader, more nuanced view of what policy interests a state has when it enacts a statute or otherwise adopts a rule of law. He may have thought that, on such a view, there would be only a trivial number of unprovided-for cases.

In any event, the true-conflict cases were the subject of his comparative-impairment analysis. He believed that comparative impairment, adopted across the board, would yield as much primary predictability for the parties as is possible in a multistate nation and at the same time advance the policy objectives of each of the several states to the maximum extent feasible. To explain and give substance to his analysis, Baxter offered examples of how comparative impairment would work.

He posited a case in which state *X* imposes liability on all persons and enterprises only for harm caused by negligence. State *Y*, on the other hand, has singled out food processors and imposes on them liability without fault for harm caused by the distribution of an adulterated product. The easy,

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97. See Baxter, *supra* note 4, at 7-8.

false-conflict cases are those involving *Y* (or non-*X*) food processors, in which *X* has no interest, and those involving *X* (or non-*Y*) consumers, in which *Y* has no interest. But, Baxter said, it does not necessarily follow that the states' interests are in balance in a case involving an *X* food processor and a *Y* consumer.<sup>98</sup> Perhaps the consumer, residing in *Y*, is domiciled in *X*; or the consumer has died and the suit is for the benefit of relatives identified with *X*. In either case, *Y*'s interest in protecting its consumers is diminished and can properly be subordinated to *X*'s. On the other hand, if the *X* food processor, "though incorporated in *X*, has its principal place of business in *Y*, or if the processor, for any reason, is less identifiable with *X* than is the consumer with *Y*," *X*'s interest is diminished and *Y*'s rule of absolute liability properly controls.<sup>99</sup>

Baxter's next example consists of variations on this pattern. *X* has a highway speed limit and its law provides that violation of the limit is per se negligent. *Y* also has a speed limit but no per se negligence rule. In the first version, a resident of *Y* driving a truck on an *X* highway violates the *X* speed limit and causes injury to a resident of *X*; *X*'s per se negligence rule should be applied because *X* has an interest in implementing its regulatory speed-limit rule within its boundaries, and its interest in the application of its per-se rule offsets *Y*'s interest in application of its own rule governing the distribution of losses. Similarly, if an *X* driver injures a *Y* resident, the *X* per se rule should be applied because *X* has an interest in regulating speeds on its highways; again the differing loss-distribution rules offset one another. But, finally, if a *Y* driver injures a *Y* resident, the answer is different. To the exclusion of *X*, *Y* has an interest in how losses are distributed among its residents. *X*, to be sure, has a regulatory interest in the enforcement of its speed limit (which its lawmakers think is aided by the per se loss-distribution rule), but that regulatory interest "will not be impaired significantly if it is subordinated in the comparatively rare instances involving two nonresidents, who are residents of a state or states that reject the per se subrule."<sup>100</sup>

Those examples were tort cases. For a consensual example, Baxter supposed a usury statute in state *X* but not in state *Y*. Both states recognized "the commercial importance of performance of consensual undertakings and access to the largest possible number of customers."<sup>101</sup> But *X*, unlike *Y*, had decided that an exception to the usual freedom to contract should be made in order to protect a described class of borrowers against overreaching or bad judgment. First, Baxter said that the *X* usury law should not be applied to any case not involving an *X* borrower, because no purpose of *X* would be

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98. See *id.* at 7-8.

99. *Id.* at 11.

100. *Id.* at 13.

101. *Id.* at 14.

served by application of *X* law,<sup>102</sup> and thus this case would present a false conflict. But Baxter reasoned that not all cases involving an *X* borrower should be subject to *X* law since, if the borrowing was done in *Y* from a *Y* lender, *Y*'s interest in freedom of commercial transactions deserved consideration. A choice-of-law rule based on the identity of the lender, on the other hand, would go too far in *Y*'s direction because it would encourage the proliferation of lending institutions just across the border from *X* in *Y*, attracting would-be *X* borrowers and thereby impairing *X*'s interest in protecting them. The answer that, according to Baxter, "affords maximum implementation of the policies of both states,"<sup>103</sup> is to apply the *X* usury law when the *Y* lender knows of a borrower's residence in *X* and not otherwise.<sup>104</sup>

Baxter's final hypotheticals provide an alternative to the much-maligned rule that the law of the situs determines issues affecting real property. In the first hypothetical, he described what he regarded as a case of a false conflict: A man who has lived for many years with his wife and children in *X* dies intestate, leaving land in *Y*. Under the *X* law of intestacy, one-third of the property goes to the widow, two-thirds to the children in equal shares; under *Y* law, the property is divided equally between the widow and the children. Because no *Y* party is involved, *Y* law is simply not pertinent and the *X* law of succession governs. After all, *X*'s law reflected its policy regarding how property should be distributed among its resident family members upon the death of one of them. Then came the hard case: that of the deceased resident of *X* who had devised the real property in *Y* to members of his family, all residents of *X*, in a will that violated *Y*'s Rule Against Perpetuities but not *X*'s. In this case, *Y* as the situs expressed in its Rule Against Perpetuities its real interest in freeing property from long-term restraints in favor of alienability and thus economic development to the benefit of its residents. *X*'s less restrictive Rule Against Perpetuities expresses its interest in the freedom of its testators to dispose of property as they wish. Baxter's solution: Apply the law of the situs except in the rare instance in which the testator did not know he was devising *Y* real estate. The resulting impairment of *Y*'s interest is minimal because of the rarity of such cases, and *X*'s interest in testamentary freedom is thus furthered at small cost.<sup>105</sup>

There are a few things to be said about Baxter's hypotheticals. First, as we have suggested, they demonstrate his appreciation that state interests, in their richness and variety, go beyond Currie's protection of resident defendants and compensation of resident plaintiffs. Baxter recognized state interests in maintaining free markets, protecting reasonable party expectations, and fostering the transferability of property. Furthermore, Baxter does not

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102. *See id.*

103. *Id.* at 15.

104. *See id.* at 14-15.

105. *See id.* at 16-17.

flinch. He does not pose easy cases. Indeed, the case of the *Y* driver injuring the *Y* resident on an *X* highway is so closely balanced that, it seems to us, Baxter had to strain to find factors that might justify a decision for one state's law rather than the other's. And he acknowledged the difficulty: "Borderline cases arise that thwart easy application of every principle of law, but they are decided nonetheless. The judge decides on the basis of some marginal factor and justifies his decision as best he can in his opinion."<sup>106</sup> In a footnote to one of his hypothetical cases that seems to us telling, he said that the process of identifying "the objective or objectives underlying" each contesting state's rules "will sometimes be difficult, and reasonable disagreement may exist regarding" such objectives.<sup>107</sup> He continued:

In the present and subsequent hypothetical cases used to illustrate application of the suggested analysis, I state the objectives I think commonly underlie various internal rules. A reader who disagrees with the objective assigned to any particular internal rule will probably disagree with the choice-of-law *conclusion* I suggest. But disagreement on that basis does not necessarily involve, and should be distinguished from, disagreement with the choice analysis suggested.<sup>108</sup>

In that same footnote, Baxter stated that the process of identifying objectives underlying state rules, while sometimes difficult, "is a familiar one rather than a unique concomitant of the choice analysis proposed."<sup>109</sup> We are not sure quite what this means; judges must often interpret statutes and, in doing so, will seek to understand what purposes the lawmaker intended to achieve by them. That seems different from seeking the objective that underlies a known rule. However, our concern with Baxter's comparative-impairment analysis is that, while acknowledging the difficulties, including the possibility of "reasonable disagreement" regarding a state's policy objectives, he underestimated them. Baxter himself wrote that the comparative-impairment principle seemed to him "vulnerable to attack only on the ground of uncertainty—that it is so vacuous in content and uncertain in application as to be inappropriate for adjudicative administration."<sup>110</sup> We would not choose the pejorative "vacuous" as our descriptor, but our criticism of comparative impairment is substantially the one that Baxter himself anticipated in his scholarly candor. For reasons that we elaborate immediately below, we doubt that it can be applied predictably in the "substantial majority of cases," as Baxter claimed.<sup>111</sup>

We fear that, in practice, judges have neither the data nor the intuitive understanding of the complexities of any legal problem to make the com-

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106. *Id.* at 9.

107. *Id.* at 12 n.28.

108. *Id.*

109. *Id.*

110. *Id.* at 20.

111. *Id.* at 21.

parative-impairment determination in the scrupulous, analytical way that Baxter envisioned. In the end, judges must make rough guesses, as in a vast array of judicial contexts. If, however, what is sought is a judgment as to which of two states' policies will be least impaired by application of another state's law to a multi-state dispute, virtually every such case will lack an easy, empirically demonstrable solution. The difficulty lies in the nature of the interstate dispute in which there is a true conflict. By definition, at least two states, each with a legitimate claim to apply its own laws, have reached different conclusions regarding the appropriate treatment of a legal problem. Either this particular interstate situation will arise rarely, in which case neither state's policy is much affected by the choice-of-law rule, or it will be a common occurrence, in which case both states' policies would be significantly impaired by the choice of the other state's law.<sup>112</sup> The comparison would be simple if one state's policy were barely impaired while the other state's policy would suffer significant impairment. But, almost always, courts must compare either two large impairments or two very small ones. In either case, making a determination about relative impairments will almost always be difficult.

Consider, for example, the California case *Bernhard v. Harrah's Club*,<sup>113</sup> a case in which a court professedly applied Baxter's mode of analysis.<sup>114</sup> A California patron of Harrah's Club, a Nevada casino, was returning to California on a California highway. The patron was intoxicated and injured California plaintiffs in an automobile accident. In California, a tavern keeper is forbidden to serve alcohol to an intoxicated patron; furthermore, the tavern keeper is liable to third parties for any injuries caused by the patron if the tavern keeper continued to serve alcohol to him after he became intoxicated. Nevada did not hold the tavern keeper liable to third parties for these injuries, although a misdemeanor criminal statute did forbid serving alcohol to a drunk patron.

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112. There are some possible exceptions to this point. Occasionally, the applicable law of one state will already have been changed or repealed, but retroactivity rules permit the application of the old law to a particular dispute. For example, suppose that state *A* had a guest statute in force at the time of the accident, but repealed it in favor of a simple negligence rule by the time of litigation. In this case, both state *A* and state *B*, which always had a negligence rule, have expressed policies in favor of compensation. Currie would have labeled this case a false conflict after performing a "moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose." Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963). In contrast, Baxter might identify a true conflict but nevertheless conclude that state *B*'s policies will suffer more impairment. Here is an example where state *A* has a policy but doesn't value it much. In Baxter's hypothetical bargaining scenario, state *A* might well trade away its lawmaking authority here in exchange for gaining it someplace else. Typically, however, the two states favor competing policies reflected in their presently enforced laws, in which case our textual point holds.

113. 546 P.2d 719 (Cal. 1976).

114. See *id.* at 723-24.

*Bernhard* clearly presents a true conflict. California presumably seeks to deter automobile accidents by depriving tavern keepers of their financial incentive to promote drunkenness. California also seeks to ensure compensation to those injured by drunk drivers. Nevada, on the other hand, seeks to protect its tavern keepers from excessive liability. Drinking and gambling cater to the tourist trade, and tourism comprises an important service industry in Nevada. Nevada has chosen to discourage the serving of drunk patrons with a criminal statute rather than with civil liability. Presumably the criminal statute protects the tavern keepers with prosecutorial discretion, a higher burden of proof, and other procedural safeguards. And the criminal fines may well be smaller than the potential civil liabilities. Clearly, then, each state is interested in applying its own laws.

Suppose this is a rare case. That is, suppose, contrary to what is probably the fact, that California residents rarely drive into Nevada to drink and gamble, so that Californians rarely are injured as a consequence of Nevada tavern keepers' behavior. If so, neither state suffers much as a consequence of the application of the other state's laws. Even if this particular tavern keeper is held liable, other Nevada tavern keepers have little cause for concern precisely because the case is a rare one. Their practices, prices, and insurance coverage will likely go unaltered. Similarly, California will not experience an increase in accident rates or uncompensated plaintiffs if Nevada law is applied. It can still effectuate its policies, even if this particular accident was not prevented. And this particular injured plaintiff may well be able to sue the drunk driver or his own insurance company to get compensation for his injuries.

Now, suppose instead that what happened in *Bernhard* happens frequently. Suppose, more realistically, that every weekend California patrons pour into Nevada where they drink and then try to drive back home, risking the lives of others on the California highways. Now California's policies in favor of deterrence and compensation suffer significant impairment if California law is not applied to these accidents. On the other hand, Nevada also has a lot at stake in this case. If potential liability turns on the domicile or destination of the patrons, something that a bartender cannot easily discern, then the entire practice of the tavern keepers must change. Insurance rates will likely rise, assuming that insurance is even available to cover this liability. Moreover, the taverns' prices will rise for all patrons, and some taverns may be driven out of business by the threat of liability.

Regardless of the frequency of these cases, the determination of whose law would be most impaired is impossible to make with certainty. When the cases occur rarely, the choice-of-law determination is perhaps of little consequence. When they occur frequently, the choice-of-law determination matters more. But given the plausibility of either result under comparative impairment, there is no reason to believe that in either instance one state's

courts will choose the same governing law as the other. This uncertainty erodes the purported benefits of comparative impairment.

In the actual *Bernhard* case, the Supreme Court of California based its decision on the fact that the Nevada tavern keeper solicited business in California. Because the club was purposely seeking to reap profits from California patrons, it seemed fair to subject the club to California's liability rules.<sup>115</sup> The court restricted its fairness analysis to the parties—it considered the particular defendant Nevada tavern keeper rather than Nevada tavern keepers generally. However laudable the concern may be, such an argument has little to do with comparative impairment.

Baxter himself applied criteria exogenous to his proposal to justify some of his suggested outcomes. When discussing true conflicts involving usury laws, for example, Baxter proposed that the lender's less stringent state law be applied unless the lender knows or had reason to know the residence of the borrower, in which case the laws of the borrower's state should be applied.<sup>116</sup> In support of this result, Baxter pointed out that the policy behind the state law of the borrower, protecting some borrowers, "would be shielded from wholesale evasion . . . [by assuring] that prior to extending credit the lender will discover . . . characteristics of membership in the protected class."<sup>117</sup> At the same time, the lenders' "[c]onsensual expectations"<sup>118</sup> would be protected. The result, in truth, turns on the normative criterion of fairness to the parties rather than on the maximization of state policies.

Baxter also shifted focus in his Rule Against Perpetuities hypothetical.<sup>119</sup> He concluded that the situs state's law should govern this testamentary issue unless the decedent was unaware that he was devising property located in the situs state. Once again, fairness to a party, here the testator, supplants any real assessment of which state's policy will be least impaired by applying the other's law.

Complicating both the determination of state interests and the calculation of relative state impairment is the state legislative practice of bundling issues. Two seemingly unrelated (or related but different) laws may work together to produce a result intended by the legislature. However, if either law is considered in isolation, both its purpose and importance can easily be misconstrued. Returning to the *Bernhard* case, for example, the California court apparently assumed that Nevada's criminalization of the sale of alcohol to drunk patrons represented a policy of deterring certain behavior. While the court was no doubt correct, it missed Nevada's delicate balancing of the in-

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115. See *id.* at 725 (finding that defendant, by advertising and otherwise soliciting California business, "has put itself at the heart of California's regulatory interest").

116. See Baxter, *supra* note 4, at 14-15.

117. *Id.* at 15.

118. *Id.*

119. See Baxter, *supra* note 4, at 16.



centives when it ignored the procedural protections and relatively modest sanctions<sup>120</sup> that had been bundled with Nevada's substantive criminal prohibition.

A related problem, the issue of depeceage, already has been identified by conflicts scholars. Depeceage refers to the separation of legal issues within a single case, where state *A* law is applied to some issues, but state *B* law is applied to others.<sup>121</sup> Often, under interest analysis, a court ends up splitting the substantive law applicable in a single case. Depeceage can occur whenever a court determines that state *A* is interested in some legal issues while state *B* is interested in others, and therefore applies the substantive laws of state *A* to resolve some issues while applying state *B*'s law to resolve others in the very same case. When each state's policy bundle is split in this fashion, the outcome of the case might be one that ultimately furthers neither state's policy.

Of course, depeceage may have either a positive or negative effect, depending on the legal issues involved. When two state laws or rules are so closely related or interconnected that they appear to come as a package, then splitting up the laws and applying only one to a case thwarts state policies. To give an example, suppose that a resident of state *X* sues a resident of state *Y* to recover for a death caused in state *Y*. Suppose further that state *X* permits a cause of action for wrongful death but caps damages for wrongful death at \$25,000. Suppose that state *Y* does not permit a cause of action for wrongful death, and a state law prohibits caps on tort judgments. Suit is filed in state *X*, an interest-analysis state, and the court first considers whether the plaintiff can sue for wrongful death. State *X* law will likely apply to this issue because state *X* has an interest in ensuring compensation for its residents. Then suppose that the court considers separately the issue of damages. Here, the court might apply the state *Y* law capping damages, because *X* has no interest in caps that protect *non-X* defendants, yet *Y* has an interest in deterring accidents, which may be furthered by prohibiting damage caps. Thus, the plaintiff may be able to bring a wrongful death claim with potentially unlimited damages, a result that could not occur independently under either state's law. Depeceage in this case frustrates the decision of the legislature of state *X* to condition recovery for wrongful death on capping the awardable damages, reasoning that a large award would generate a windfall for the survivors. And state *Y* may have disallowed the wrongful death action precisely because it was unable to cap the damages. In both states, then, the cause of

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120. See *Bernhard*, 546 P.2d at 721-22.

121. See SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 128 (1998). Depeceage is common in interstate cases if only because the forum virtually always applies its own procedural law, but it may apply another state's substantive law.

action and the limitation come as a package: Either both appear in the state's laws, or neither is available.

Courts often fail to take this packaging or bundling of laws into consideration. When a rule is wrongly interpreted, or evaluated without reference to the rest of its bundle, the interpreter or evaluator has committed what is known in law and economics as the "isolation fallacy."<sup>122</sup> When a rule is considered in isolation without regard to the general policy of which that rule may be only a part, the outcome may be bad policy. Courts using Baxter's comparative-impairment analysis are particularly susceptible to this fallacy.

One of Baxter's hypotheticals suggests why. Recall his example of state *X*, which has a speed limit and a rule that violation of the speed limit was per se negligence, and state *Y*, which also had a speed limit but no per-se negligence rule.<sup>123</sup> He used the example, among other things, to distinguish between conduct-regulating and loss-distribution rules within tort law. Conduct-regulating rules are designed to encourage a particular level of care to prevent accidents, while loss-distribution rules allocate the risk of injury when an accident occurs. Baxter classified the speed limit as conduct-regulating and the per se negligence rule as loss-distributing, though acknowledging that the latter might affect conduct somewhat.

In one variation of the hypothetical, a truck driver resident in *Y* injures another resident of *Y* while driving on a highway in *X* in violation of that state's speed limit. Baxter concluded that comparative-impairment analysis called for the application of *Y*'s law because *Y* has an interest in how losses are allocated among its residents and *X* has none. Moreover, the knowledge that *X*'s stringent liability rules would not apply if he injured another *Y* resident while speeding would be unlikely to motivate a *Y* truck driver to speed and thus thwart *X*'s interest in highway safety. Thus, *X*'s interest, expressed in its conduct-regulating speed limit, would be impaired only slightly if *Y*'s law was applied.

Let us now consider the problem from the perspective of state policy bundles. The issues of driver safety and criminal, administrative, and civil liabilities are bound together along with such issues as no-fault insurance and mandatory insurance coverage. Different states may use different combinations of these laws to minimize both the incidence and thus the costs of accidents and the costs of enforcing the relevant legal rules. For example, two states may set differing speed limits for the same set of driving conditions, yet enforce those speed limits in differing ways. State *P* may have a lower speed limit for its highways, say fifty-five miles per hour, whereas state *Q*

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122. Cf. Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1230 n.35 (1994) ("The isolation fallacy is the failure to recognize that a particular institution that cycles might not cycle if it works in conjunction with another institution.").

123. See note 100 *supra* and accompanying text.

permits drivers to travel on its comparable highways at sixty-five miles per hour. On its face, then, state *P* appears to have chosen a policy outcome different from the one state *Q* has chosen. However, the speed limits themselves are only a small part of either state's efforts to encourage safe driving. State *P* may have a relatively low fine for speeding less than ten miles over the speed limit, for example, whereas state *Q* may impose high fines for any driving in excess of the speed limit. And, given the fine structure, traffic officers in both states may refrain from ticketing those who are driving less than sixty-five miles per hour. When the speed limit is now considered in conjunction with the fines and traffic enforcement, the bundles suggest that the policies of the two states regarding safe driving speeds are in accord.<sup>124</sup>

States also may choose different legal tools to encourage safe driving speeds. Even if states *P* and *Q* both chose a sixty-five-mile-per-hour maximum highway speed, state *P* might rely primarily on police enforcement whereas state *Q* might prefer private enforcement. This difference might turn on a variety of factors including the costs of providing traffic enforcement. State *P* might find it cheaper to employ a large traffic patrol force, and patrol officers might be better able to recoup patrolling expenses with the traffic ticket revenues. State *Q* might have more difficulty supporting the expense of public enforcement and decide that adding a strong threat of civil liability in the event of an accident was necessary to adequately deter unsafe driving.<sup>125</sup> State *Q* might quite sensibly adopt a per se negligence rule to aid its efforts.

Thus, states can use differing bundles of mechanisms to produce a given ex ante behavioral incentive. State *P* might have a fifty-five-mile-per-hour speed limit and no per se negligence rule. State *P* might prefer public enforcement and choose the fifty-five-mile-per-hour limit to allow for some slack in enforcement. If so, a per se negligence rule would not make sense. In contrast, suppose that state *Q* chooses a sixty-five-mile-per-hour speed limit and wants to send a clear signal that this limit should be strictly heeded. State *Q* might sensibly adopt a per se negligence rule, especially if enforcement becomes costly.

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124. The real difference here may lie in state concerns for speedometer inaccuracies. State *P* may set the speed limit lower than the safe maximum of sixty-five miles per hour to take into account the possibility that a car's speedometer will underestimate the speed at which the car is travelling. If ticketing occurs only when a car is detected by radar to be travelling at sixty-five miles per hour or faster, then the police can safely assume that the driver was aware that he was exceeding the fifty-five miles per hour limit. State *Q* may ignore these concerns, and may prefer to instead send the community a clear signal that the laws reflect the limits of safety and should be followed outright. In state *Q*, then, the driver bears the entire risk of erroneous speedometer readings.

125. State *Q* might also have more problems controlling police corruption or selective enforcement of the speed limits. In these cases, an accident often proves in itself that the driver exceeded the bounds of safety, so that something external to the police officer's veracity established the driver's culpability.

Now, returning to Baxter's hypothetical, suppose that the defendant drove five miles per hour faster than state *X*'s sixty-five-mile-per-hour speed limit. Suppose further that *Y* had adopted a fifty-five-mile-per-hour speed limit. In this case, state *X*'s per se negligence rule might be recognized as a means of preventing people from driving seventy miles per hour. Though its nominal speed limit is lower than *X*'s, State *Y* shares the desire to prevent people from driving seventy miles per hour, but it has chosen instead to have an active patrol force and to impose substantial fines for driving that fast. In both states, driving at seventy miles per hour and causing an accident results in significant monetary punishment.

If that is the explanation of *X*'s per se negligence rule, then comparative impairment enables the *Y* truck driver to escape both the high fine that his state exacts for speeding on its highways and the per se negligence liability that *X* imposes. In short, depeceage prevents both states' policies from being effectuated.

We have, no doubt, indulged in a fair amount of speculation about the bundling of state rules and the goals each state might be attempting to achieve with this bundling. And we did not consider the effects of automobile insurance on state regulatory efforts. But the difficulties of determining exactly what a state intended with which set of rules in any given context helps to demonstrate our basic point: The comparative-impairment approach requires factual details and analytic foci that typically exceed available judicial resources.

There is a final point: In many cases, judges will not be overly precise in applying their comparative-impairment analysis. Judicial decisions serve as precedents for future litigants, so that the information contained in both the decision and its accompanying opinion becomes a public good (or bad, if the decision is wrong). The public good aspect of decisionmaking encourages judges to invest time and effort to generate sound precedents.<sup>126</sup> And, because the precedent created today likely will be applied in the future to different parties, judges have some incentive to decide the present case impartially.

When the case involves a choice of law, however, these pressures toward soundness and impartiality may be quite weak. Judges have less incentive to create sound precedents if their decisions are unlikely to be used in the future.<sup>127</sup> The narrower the judicial inquiry and the rarer the factual context, the less that precedent will be relied on in the future. Because the precedent

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126. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 28 (5th ed. 1998) ("The judge must therefore consider the probable impact of alternative rulings on the future behavior of people engaged in activities that give rise to the kind of accident involved in the case before him.").

127. Lower court judges might also generate sound precedents to avoid being reversed on appeal. However, if a choice-of-law decision is unlikely to be relied on in future cases, then the appellate court has little incentive to scrutinize closely the trial court's determination.

generated by the comparative-impairment analysis is necessarily narrow, the judge likely is not willing to invest much in his decision. After all, the outcome of this state interest balancing will apply only when, for example, the plaintiff is a resident of state *X*, the defendant is from state *Y*, the relevant events occurred in state *Z*, and the dispute involves this specific legal issue. And yet, the comparative-impairment inquiry is routinely difficult. This combination of a weak incentive to be right and a high risk of being wrong undermines the practical utility of the comparative-impairment approach.

When judges lack the incentive to produce sound decisions, then other influences predominate. Some judges may decide cases with an eye toward simplifying the judicial task. Applying the law of the state that denies a cause of action to the plaintiff may be an extreme example, but, more realistically, lazy or overworked judges may apply forum law more often when the precedential value of their determinations is low.<sup>128</sup> Other judges may be more result-oriented and prefer to see that litigation generates "just" results in individual cases.<sup>129</sup> Narrow precedent decisions may therefore be more likely to reflect the judges' personal biases than will broader decisions. And judges may be more likely to favor local litigants over outsiders.

We have probably done an injustice to Baxter by concentrating on his comparative-impairment analysis without taking fair account of the second half of his article.<sup>130</sup> He indicated early in the article that he regarded that half as the more important of his points. By way of introduction to the comparative-impairment discussion, he wrote: "Because my thesis of the role of the federal courts in conflicts cases depends in substantial part on my view of the governmental interest analysis, an exposition of that view is necessary."<sup>131</sup> His thesis that the federal courts should play a major role in conflicts cases is developed in a painstaking analysis of text, legislative history (constitutional and statutory), and precedent. He introduced this thesis by saying that it "seems unsound" to place in the hands of the state courts extensive responsibility for deciding when their "policies will yield to and when they will prevail over the competing policies of sister states."<sup>132</sup>

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128. Cf. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 983 (1994) (observing that courts do not care much about the choice-of-law aspects of their decisions).

129. In an annual lecture to first-year students at Cardozo Law School, the late Charles D. Breitell, former Chief Judge of the New York Court of Appeals, explained that judges first approach cases by asking themselves which party deserved to win. "Only after ascertaining where justice lies in the individual case do judges move on to the next question: What harm to the jurisprudence will result if I do justice in the individual case?" *Id.* at 995.

130. Indeed, Baxter suggested as much in his oral commentary on our presentation at the symposium held in his honor at Stanford Law School in November 1998.

131. Baxter, *supra* note 4, at 6.

132. *Id.* at 23.

He sought to nail down the point with an analogy: "Baseball's place as the favorite American pastime would not long survive if the responsibilities of the umpire were transferred to the first team member who managed to rule on a disputed event."<sup>133</sup> True enough, but to borrow Baxter's analogy, some critics believe that the extraordinary discretion disinterested umpires have to define their own strike zones has tarnished baseball's luster. In the previous sections, we have tried to confine our criticism of comparative impairment to what we perceive as its failure to define the strike zone precisely enough to constrain any umpire, interested or disinterested. That alone is relevant to the rationality and integrity of comparative impairment as an intellectual construct. But it is relevant to the usefulness of comparative impairment as a practical nationwide choice-of-law regime that in the last thirty-five years there has been no movement of the federal courts toward assuming the role of impartial umpires and none is in prospect<sup>134</sup> despite Baxter's persuasive argument. In these circumstances, if comparative impairment were universal, what we would have is interested parties calling balls and strikes *and* using an ill-defined strike zone.

Take, as an example, the difficulty a judge of ordinary legal acumen would have in distinguishing between comparative-impairment analysis and making super-value judgments—deciding which state's law is the better law to apply. It is "one of the cornerstones" of Baxter's article "that super-value judgments are separable from the comparative-impairment principle."<sup>135</sup> Comparative impairment, he urged, calls for an objective determination of which state's interest would be least impaired by subordination of its law; while a judge making a super-value judgment is deciding which law he thinks is better normatively. But Baxter himself suggested that scholars of the quality of Brainerd Currie and Paul Freund have confused the two.<sup>136</sup> Think, then, of the run-of-the-mill state court judge, lacking the analytical skills of a Currie or a Freund. Regardless of the intellectual labelings, such a judge is unlikely to subordinate the local normative rule to a contrary substantive law of another state.<sup>137</sup>

The single scant piece of empirical evidence available, too little to rely upon alone with certainty, nevertheless potentially supports this view. Relative to interest analysis, comparative impairment might reduce forum law

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133. *Id.*

134. Since 1963, the Supreme Court has reaffirmed its commitment to *Klaxon's* rule that a federal district court is to decide a choice-of-law case just as a state court of its district would. *See Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975).

135. Baxter, *supra* note 4, at 22.

136. *See id.* at 18.

137. Baxter expressed similar concerns regarding attempts to identify normative choice criteria that focus on the interests of the parties to the suit. *See id.* at 6.

bias, but only by a small amount at best.<sup>138</sup> Recall that Baxter's multilateral approach to true conflicts was intended to reduce the forum law bias of interest analysis. The empirical investigation of this possibility yields smaller differences than one might predict, if any, and what we have said about judicial incentives helps to explain an otherwise surprising result. In short, because the comparative-impairment principle is so difficult for judges to apply, the temptations of leisure or favoritism can prevail.

## V. A MODIFIED *FIRST RESTATEMENT* ALTERNATIVE

Baxter frequently emphasized the importance and desirability of primary predictability, the ability of parties to predict *ex ante* what the legal consequences will be if something goes wrong or a transaction otherwise engenders a dispute or an accident happens.<sup>139</sup> His criticism of the *First Restatement* rules, remember, was that "[a]s means to the end of predictability" they were not too rigid but rather "not rigid enough."<sup>140</sup> He indicated, however, that the fostering of primary predictability is not enough to sustain choice-of-law rules, although his only stated reason for this conclusion was that "more rigid choice rules easily could be but have not been devised," which strongly suggests "that the profession has not yet concluded no objectives other than predictability exist to be served."<sup>141</sup>

At a later point in the article Baxter gave his response "[i]n its briefest form" to one who would urge "a rigid and predictable system, *i.e.*, one that is arbitrary except as it serves the goal of primary predictability."<sup>142</sup> This response was that "the comparative-impairment principle can be applied with conviction and predictability in a substantial majority of cases and . . . the gains in effectuation of local policies will more than offset the costs incurred by marginal reduction of primary predictability."<sup>143</sup>

We have stated our reasons for believing that here, as elsewhere, Baxter underestimated the uncertainty that resides in comparative-impairment analysis even when undertaken in the best of faith. We have added, as a further flaw of comparative impairment, the bias in favor of forum law that results from the want of an impartial umpire, which magnifies secondary

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138. See Thiel, *supra* note 73, at text accompanying n.63. Actually, Thiel never expressly considered the effects of comparative-impairment analysis on court decisions. He did, however, conclude that the interest analysis states, grouped together and including the outlier state of California, showed a pro-forum-law bias. His results were strengthened slightly when California cases were omitted from the interest analysis group. See *id.* at n.63. We infer from this result that, at most, comparative impairment only slightly reduces forum law bias relative to interest analysis.

139. See, e.g., Baxter, *supra* note 4, at 3, 9, 20-22.

140. *Id.* at 3; see also text accompanying note 40 *supra*.

141. *Id.* at 4.

142. *Id.* at 21.

143. *Id.* at 21-22.

predictability at the expense of primary predictability. We believe that the reduction in primary predictability will therefore be more than marginal.

Baxter wrote critically of attempts to find a normative basis for choice of law that focus on "the interests of the immediate parties to the transaction" because they lead to the necessity of making super-value judgments.<sup>144</sup> We agree with this criticism. But that ex post focus on the parties is quite different from considering the ex ante interests of persons and firms in ordering their affairs, as Baxter of course recognized when he wrote that "few would deny" that primary predictability "is a goal worthy of pursuit."<sup>145</sup>

We suggest that primary predictability is not just a goal worthy of pursuit but should be the primary goal of any system of choice-of-law rules. Whether it should be the exclusive goal—that is, whether, if a rational system could be devised whereby the realization of state interests in conflicts cases could be maximized with only a minimal loss of primary predictability, the maximization would be worth the loss—is an issue we need not take on. All that we contend is that a "rigid and predictable system" such as Baxter supposed, "arbitrary," perhaps, "except as it serves the goal of primary predictability," is preferable to a system that yields as much uncertainty as comparative impairment seems to us to yield.<sup>146</sup>

We have no doubt that, if the parties (or their lawyers) contemplating an interstate transaction were consulted, all of them would be much more interested in being certain about which state's law would apply in case of a dispute than in whether the choice-of-law rule applied in the adjudication of the dispute would rationally maximize the interests of states *X* and *Y*. Although, as Baxter noted, primary predictability is more important in the kind of case we have just supposed—a consensual arrangement—than in the case of the unplanned personal injury accident,<sup>147</sup> many potential tortfeasors—such as manufacturers of products—are well aware of governing law and can alter their actions depending on what law is expected to be applied. And insurance companies are vitally interested in what law will apply to an insured's allegedly tortious conduct and can help the insured to plan accordingly.

Lawyers who practice across state lines, and are thus subject to discipline and malpractice liability in several jurisdiction, are illustrative of potential tortfeasors who would want to know what rule will govern their conduct.

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144. *Id.* at 4-5.

145. *Id.* at 3.

146. As we note in the text, the parties themselves value primary predictability. We should also add that primary predictability promotes social utility. If the parties have clearly established legal rights, then presumably they are much better able to bargain privately and reach more efficient outcomes. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960) ("[I]f market transactions were costless, all that matters . . . is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast.").

147. See Baxter, *supra* note 4, at 3.



The drafters of the American Bar Association's amended disciplinary rule regarding choice of law thus saw a need for "relatively simple, bright line rules"<sup>148</sup> to enable such lawyers to know to what disciplinary rule their conduct must conform. The amended Rule 8.5 of the *Model Rules of Professional Conduct* provides simply that, if the breach of a disciplinary rule is related to litigation in the forum, then forum rules apply so long as the lawyer is admitted to practice in the forum state.<sup>149</sup> In all other cases, whether the lawyer's conduct is related to litigation or to negotiating or counseling, the law of the state in which the lawyer is admitted to practice governs.<sup>150</sup> If the lawyer is admitted to practice in two or more states, then the law of the state in which the lawyer "principally practices" governs unless "particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed."<sup>151</sup>

Obviously the rule leaves some room for the exercise of judgment, and a law review symposium on the subject elicited some criticism that the rule was not rigid enough.<sup>152</sup> But others in the same symposium criticized the rule as too rigid.<sup>153</sup> That criticism is reflected in the *Restatement of the Law Governing Lawyers* recently approved by the membership of the American Law Institute. The discussion is a model—we are tempted to say "parody"—of the multifactored approach of the *Second Restatement*. The professed aim of the restaters of the law governing lawyers is to find "the jurisdiction with the most significant relationship to the charged offensive conduct" so that its law can be applied.<sup>154</sup> Thus, the tribunal should consider a list of factors—including, apparently, something like comparative impairment: "the nature of the regulatory interests reflected in the different provisions in question."<sup>155</sup>

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148. See ABA Comm. On Ethics and Professional Responsibility, Recommendation and Report to the House of Delegates 4 (1993).

149. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(1) (1993). See generally H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73 (1997) (discussing choice-of-law problems and the ABA's solution).

150. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(i) (1993).

151. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5(b)(2)(ii) (1993).

152. See, e.g., Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 760-61 (1995); Jeffrey L. Rensberger, *Jurisdiction, Choice of Law, and the Multistate Attorney*, 36 S. TEX. L. REV. 799, 833-37 (1995).

153. See Gregory B. Adams, *Reflections on the Reaction to Proposed Rule 8.5: Consensus or Failure*, 36 S. TEX. L. REV. 1101, 1105 (1995) ("[T]he ultimate failure of proposed Rule 8.5 is that it ignores the very state interests that have created the impetus for the revision.").

154. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. h (Proposed Final Draft 1998).

155. The list of factors also includes "the nature of the charged offense; the nature of the lawyer's work; the impact of the questioned conduct on the interests of third persons and on public institutions such as tribunals, administrative agencies, or legislative bodies; the residence and place of business of any client or third person whose interests are materially affected by the lawyer's actions; and the place where the affected conduct occurred." *Id.*

In the end, say the restaters, there can be "no more specific formula" than what they have set forth, "and each issue of conflict must be addressed on its specific facts."<sup>156</sup>

It is perhaps unfair to contrast the relative rigidity of the ABA rule with an approach that Baxter himself would have undoubtedly eschewed. But our fear is that the search for which state's interest is least impaired is about as uncertain of outcome as the search for the state with the most significant relationship. And lawyers cannot be the only potential defendants who desire a rule more than they concern themselves with its content.

In support of his comparative-impairment principle, Baxter wrote that, "[i]n deciding whether real conflicts issues ought to be resolved by application of the suggested standard, the relevant question cannot be 'Will such application resolve the issues infallibly?' Rather the question is 'Which is the most satisfactory of alternative modes of resolution?'"<sup>157</sup> Precisely so: Beware the "nirvana fallacy."<sup>158</sup> All of us tend to be too eager to reject a solution when we identify one of its shortcomings. However, given that every solution is bound to have some shortcomings, the critical policy question is, indeed, the one Baxter so cogently stated.

In fact, Baxter's call for the incorporation of this and other law and economics principles into the choice-of-law issue leads us to the conclusion that the widespread rejection of the *First Restatement* rules was a classic illustration of the "nirvana fallacy" at work. Baxter identified the correct approach. Here, as well as everywhere else, decisions must be made with reference to the costs and benefits of alternative solutions. Applying those principles, we believe that a modified *First Restatement* approach is the preferred alternative.

In the process of academic vilification of the *First Restatement*, the practical virtues of its rules were typically ignored, and they remain underappreciated. No doubt there were hard cases under the *First Restatement*, for, almost by necessity, rules tend to be either over- or under-inclusive. However, despite its lack of theoretical justification, the *First Restatement* rules reached sound results in the large majority of cases. As Richard Posner has noted, the place of injury rule for torts tended to enable each state to exercise its comparative regulatory advantage.<sup>159</sup> To the extent that differing environments across the states lead to differing substantive rules, each law

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156. *Id.*

157. Baxter, *supra* note 4, at 19.

158. See Stearns, *supra* note 122, at 1229-30 (discussing intellectual flaw in comparing real world institutions with ideal, and therefore non-existent, ones); see also Coase, *supra* note 158, at 43 (warning that analysis of "ideal world" scenarios may be largely irrelevant); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-4 (1969) (noting inferior policy proposals that result from nirvana reasoning).

159. See POSNER, *supra* note 126, at 646.

should be applied in that environment for which it is optimal. For example, rural states may adopt a standard of driver care toward pedestrians different from that adopted by urban states, and the difference may turn on the relative prevalence of pedestrians or crosswalks. In the majority of cases, the defendant's negligent behavior takes place in the same state as the plaintiff's injury, and the laws in that state are presumably at least intended to suit the specific environment. And, even if the defendant acted in another state than the one where the plaintiff was injured, a defendant who is aware that his conduct has effects in another state (and therefore in another environment) should, to the extent possible, tailor his conduct to suit both environments. A place of injury rule therefore tended to create the right incentives for care.

Of course, as Currie and others pointed out, sometimes the place of injury rule seemed inappropriate. Baxter, as we have seen, distinguished between conduct-regulating and loss-distribution rules.<sup>160</sup> Guest statutes and intrafamily immunity rules presumably focus more on how losses will be distributed than they do on creating incentives for care. When a Colorado wife sues her Colorado husband for negligently inflicted injuries that she suffered in Texas, perhaps Colorado has a much greater interest in the husband's (and therefore the insurance company's) liability than does Texas. In this situation, the place of injury rule appears inapt. Unfortunately, however, we have difficulty knowing the extent to which Texas bundles its tort laws. In order to prevent abuse, Texas might have established broad rights of recovery but narrow categories of people who can take advantage of those rights. And Colorado might allow everyone to recover for negligently inflicted injuries but lower the standard of care. The *First Restatement* at least eliminated the depeage problem that inevitably arises from efforts to distinguish these two types of tort rules. Even if the distinction seems appropriate, however, the *First Restatement* could be modified to include a common domicile rule for "loss distribution" rules while retaining a "place of injury" rule for those laws directed toward conduct.

The place of contracting rule also made sense most of the time. Despite the humorous hypotheticals of law professors that cast doubt on the subrule that a contract is concluded when an acceptance is placed in the mailbox,<sup>161</sup> the place of contracting rule tended to promote primary predictability and protect justified expectations. Suppose, for example, that North Dakota protects its spendthrifts and their families by permitting any guardian of a court-adjudged spendthrift to void the spendthrift's contracts. Suppose further that South Dakota provides no spendthrift protections. *S*, a North Dakota spendthrift, purchases a car from *R*, a South Dakota retailer. Is *S*'s contract with *R* voidable? Under the *First Restatement*, it depends on where the contract was

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160. See Baxter, *supra* note 4, at 11-12; see also text accompanying note 123 *supra*.

161. Whatever else, any twenty-first century revision of the *First Restatement* rules would have to take account of today's express mail services, fax machines, and e-mail.

formed. If *S* went into South Dakota to buy the car, then *S* would receive no protection because the contract was formed in the place to which he traveled. If instead *R* traveled into North Dakota to entice sales there, then *R*'s contract would typically be subject to North Dakota's protection of spendthrifts.

The place of contracting rule tends to protect justified expectations. When *R* does business in his own state, he is entitled to rely on the protections afforded by home state laws. If he instead chooses to do business elsewhere, he is subject to the laws of another state. Baxter and others criticized the protection of party expectations as insufficient to justify the rules. No doubt they were correct that individuals learn to expect whatever the governing laws indicate that they should expect. But the maxim "when in Rome . . ." is so widespread an expectation built on a wellspring of governing rules and social norms that any other treatment of the problem seems counterintuitive to the average lay person. Contrary to Baxter's witticism,<sup>162</sup> then, it does not take law training to make one think it somehow right that a contract is governed by the law of the place where it was made.

Baxter might respond that our criticism is unfair. After all, he repeatedly resolves the hypotheticals in his article by reference to justified party expectations. Thus, in his hands, comparative impairment works in favor of primary predictability. As we have already argued, however, in the hands of judges, comparative impairment more likely results in a bias in favor of forum law or local residents. This is a classic illustration of the "rules versus standards" debate prevalent throughout law,<sup>163</sup> and for reasons that we have already articulated, we believe that the unconstraining standard, difficult to administer and susceptible to manipulation, is best replaced by even an imperfect rule that protects the same values.

Primary predictability is perhaps nowhere more essential than in contracts. The value of a contract lies in the ability of each party to rely on the other's promises, and to know the extent to which those promises are legally enforceable. The place-of-contracting rule provided foreknowledge of which state law would be applied to that contract. As an added bonus, the place-of-contracting rule also enabled the parties in some cases to choose the content of the law that would govern their contract, by contracting in a particular chosen state.<sup>164</sup> Of course, this *ex ante* tailoring might be less expensively achieved today with a choice-of-law provision in the contract itself. None-

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162. See note 36 *supra* and accompanying text.

163. For other examples of this debate, see generally James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265 (1995); Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996); Joseph R. Grodin, *Are Rules Really Better Than Standards?*, 45 HASTINGS L.J. 569 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); and Lee E. Teitelbaum, *Youth Crime and the Choice Between Rules and Standards*, 1991 B.Y.U. L. REV. 351.

164. See O'Hara & Ribstein, *supra* note 81, at 769.

theless, predictability can be enhanced in an area where *ex ante* knowledge of what the governing law will be matters much more to the parties than does the content of the governing law.

A similar argument supports the situs rule for real property issues. Professor Baxter concedes that the situs state has the greatest interest in land use issues,<sup>165</sup> and, clearly, the situs state has a comparative regulatory advantage. In resolving land title disputes, however, Baxter sees the situs state's interest as minimal.<sup>166</sup> Admittedly, title disputes involve personal rights, and a non-situs state where an affected party was domiciled might well be "interested." However, without a clear choice-of-law rule regarding these disputes, certainty of title is threatened, and the land becomes less valuable as the cost of title insurance rises. Moreover, because title issues might well arise in the future, the situs rule better enables potential purchasers and title insurance companies to discern the rights of others *ex ante*.

Furthermore, title issues often involve matters important to the situs state. Rules regarding testamentary disposition and future contingencies are rarely adopted arbitrarily merely to provide clarity of title. Instead, they represent a delicate balance between concerns for the grantor and his assigns on the one hand, and policy concerns directed toward facilitating future property use on the other. Bundled together, these rules regarding title help ensure the future alienability of property and prevent its excessive fragmentation.<sup>167</sup> And, as we have already noted, breaking that bundle apart can easily create unintended, adverse consequences.

We must emphasize that Baxter's insights lead us to a modified *First Restatement* approach. Some rules have clearly not worked well in practice and should be modified or replaced. Baxter has provided some insightful illustrations of how better to incorporate important principles into the process of formulating rules, and, no doubt, a set of modified rules should reflect his concerns. For example, some commentators have suggested a place-of-sale rule for products liability<sup>168</sup> because it better enables manufacturers to target their products to states with compatible safety standards than does a place of injury rule. Moreover, it prevents states with relatively high safety standards from exporting the costs of those standards to states with lower standards. And, of course, the proliferation of Internet products over the last few years has created a plethora of choice-of-law complications for many areas, in-

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165. See Baxter, *supra* note 4, at 16 ("Persons who live in the vicinity of the property are the intended beneficiaries of many property laws, such as the laws of nuisance, and the location of the property . . . often should control the applicability of those laws.").

166. See *id.* ("But as to competing claims of ownership, situs is not a reliable choice criterion.").

167. See generally Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. (forthcoming 1999) (noting that American property law contains a diverse set of restraints against fragmentation to protect alienability).

168. See, e.g., McConnell, *supra* note 85, at 98-99; Solimine, *supra* note 73, at 89-90 (1989).

cluding contracts, torts, and criminal law.<sup>169</sup> These and other issues indicate that a careful rethinking of the details of the *First Restatement* rules is long overdue. But, in the end, the primary predictability that rigid rules foster creates benefits that far outweigh those of a difficult, standards-based, judicial inquiry. Given the constraints, the traditional choice-of-law rules are far from empty, and they promote neutral decisionmaking, and thus, perhaps, they are optimally bloodless.

To be honest, the ambiguities and uncertainties we described in Part I, many of which are necessarily embedded within the traditional approach, reduce both primary and secondary predictability relative to the ideal, perfectly unambiguous rules we appear to hypothesize. However, relative to the modern interest analysis-based alternatives, the traditional approach appears, in fact, to generate smaller biases in decisionmaking. Despite Baxter's admonitions, conflicts scholars fell prey to the same intellectual error that pervaded the transition from legal realism to critical legal studies: the idea that, since we can never perfectly constrain judicial decisionmaking, we should not even try. Unfortunately, we are beginning to suffer the consequences of that error.<sup>170</sup> To paraphrase again one of the influential conflicts scholars of this century: Beware the nirvana fallacy.

## CONCLUSION

Participants in the symposium at which the substance of this article was presented orally suggested that the significance of choice of law has dwindled. The issues engage the courts only infrequently, and conflict of laws goes untaught in some of the most prestigious law schools, including Stanford. Parties to consensual transactions have learned to specify what law will govern their agreements, and the parties' choice is honored to a greater ex-

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169. See generally Christopher P. Beall, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 361 (1997) (discussing the problems presented by different states' quite different libel laws and how choice of law can be dispositive); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996) (discussing forum selection clauses and admiralty principles as useful tools); Aron Mefford, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEG. STUD. 211 (1997) (discussing the possibility of the development of private cyberlaw as a new *lex mercatoria*).

170. See Francis A. Gabor, *Stepchild of the New Lex Mercatoria: Private International Law From the United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 540-41 (1988) (suggesting unsettled, non-uniform laws within the United States interfere with our international trade prospects); Christopher L. Ingram, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis—A Scholar's Dream, A Practitioner's Nightmare*, 28 CREIGHTON L. REV. 663, 677 (1995) (discussing the importance of "orderliness" and "predictability" in international business and problems created by choice-of-law uncertainties); Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 271 (1996) ("[C]onflicts localism unfairly damages nonforum litigants, exhibits disrespect to nonforum governments, and undermines principles of order and uniformity in choice of law.").

tent than once was the case.<sup>171</sup> Or, if a choice-of-law issue lurks, it is often ignored. The law of torts is more homogeneous across the nation than was true during the revolution in American conflicts law, and supreme federal law increasingly governs what were once issues purely of state law.<sup>172</sup> Nevertheless, choice-of-law issues must still be resolved even if only sometimes, and it remains important, as Bill Baxter thought it was in 1963, that they be resolved rationally. It is in that spirit that we have undertaken this article.

Although we have no illusion that this article will have the impact of Baxter's original article, both of us have profited from the undertaking. For one of us, the profit lay principally in the chance to renew intellectual acquaintanceship, though from afar, with an old friend—he and Bill Baxter were law school classmates, young associates in the same law firm, and even, very briefly, colleagues on the Stanford Law School faculty. As a result of that association, this author held for Bill Baxter affection and an admiration that approached awe. For the other one of us, the profit lay in the opportunity to think about a law and economics approach to choice of law, and to discover that she, a green conflicts scholar, cannot ultimately improve upon Bill Baxter's principles. He was, without a doubt, a man much ahead of his own time.

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171. See Symeonides, *supra* note 49, at 273 ("The vast majority of [contract cases in which the contract contains a choice-of-law clause] routinely uphold such clauses, often without much discussion.").

172. Displaying a catholicity of interest in the law that continued until the end, Baxter himself, commenting on the oral presentation of this article at the symposium in his honor, mentioned *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), a dispute over the legality of a credit-card late fee. The fee was valid in the state of the card-issuing bank, but not in the state of the cardholder. But what might have been a nice question of comparative impairment was held to turn on federal law: A regulation under the National Bank Act provided that a national bank could legally charge interest at a rate allowed by the state in which it was located. See *id.* at 739-44; see also *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) (national bank entitled, under federal law, to charge interest rates permissible in home state); *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992) (state chartered bank insured by FDIC entitled, under federal law, to charge late fees permitted by home state).